Supreme Court of the United States

October Term, 1944

No. 478

MARTIN KAHNER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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REFERENCE TO THE OFFICIAL OPINION OF THE COURT BELOW.

The decision in this case was handed down by the Supreme Court of Minnesota on June 16, 1944. It is reported in 15 N. W. 2d, 105. It is not yet published in the Minnesota State Reports.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Appellant attempts to invoke the Fifth Amendment to the United States Constitution, which applies only in and to the federal courts.

Appellant attempts to invoke the Fourteenth Amendment. No showing is made that this petitioner has been denied due process. He had a fair hearing—a fair trial and that is all the Fourteenth Amendment requires. Due process does not require the finding of an indictment.

STATEMENT OF FACTS.

The petitioner, Martin Kahner, was indicted by the Grand Jury of Hennepin County, Minnesota, on October 20, 1942. The charge against him was that he attempted to dissuade and prevent one Eugene Goulet from appearing as a witness in a criminal case set for trial on October 22, 1944. The charge was made in the indictment and proved upon the trial thereof (and sustained by the Supreme Court of Minnesota) that the petitioner and his attorney tried to induce this witness not to appear upon the trial of the case in which he had been subpoenaed as a witness; that they offered to secure him a job in a defense plant in California and pay his expenses in going there.

The witness so interfered with, Eugene Goulet, was a witness before the grand jury upon the finding of the indictment. Eight other persons also testified before the grand jury upon the finding of the indictment, making nine in all.

Eugene Goulet had been sent to an insane hospital on June 12, 1942, but was only kept there three months and was released therefrom on September 12, 1942.

The petition herein on page 23 thereof lists the names of eight persons who testified before the grand jury which returned the indictment. But counsel have omitted the name of one such witness, Joseph Goulet, father of Eugene, who also testified before the grand jury, and whose name is indorsed upon the indictment as one of the witnesses.

The petition, commencing on page 23, pretends to set out what each witness testified to before the grand jury. Of course the petitioner does not know what testimony any particular witness gave before the grand jury. The proceedings of the grand jury are secret. What any witness said before the grand jury is pure surmise.

As stated, the petitioner has omitted the name of Joseph Goulet, who was a witness before the grand jury. It is equally a matter of conjecture as to what this witness testified to before the grand jury. He was a witness on the trial of the indictment.

The Supreme Court of Minnesota mentions the fact that this witness, Joseph Goulet, appeared as a witness upon the trial; and testified that he heard a part of the conversation between one of the conspirators and the boy. State v. Kahner, 15 N. W. 2d, 105, 107.

SUMMARY OF ARGUMENT.

I.

The petitioner is not entitled to invoke the Fifth Amendment.

11 Am. Jur. 1096.

II.

The petitioner's rights under the Fourteenth Amendment have not been violated.

Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 969.

Simon v. Craft, 182 U. S. 427, 437, 45 L. ed. 1165.

III.

The petitioner does not make it appear as a matter of law that incompetent evidence was received before the grand jury.

State v. Kahner, ... Minn. ..., 15 N. W. 2d, 105.

Knox v. Haug, 48 Minn. 58, 61, 50 N. W. 934.

McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

Cannady v. Lynch, 27 Minn. 435.

Schultz v. Oldenburg, 202 Minn. 237, 243, 277 N. W. 918.

Champ v. Brown, 197 Minn. 49, 266 N. W. 94.

IV.

Even if the testimony of an incompetent witness was received by the grand jury, an indictment based partly on competent and partly on incompetent evidence will be sustained.

State v. Marshall, 140 Minn. 363, 168 N. W. 174.

Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207.

Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021.

U. S. v. Perlman, 247 Fed. 158, 162.

State v. Grady, 12 Mo. App. 361.

State v. Shreve, 137 Mo. 1, 38 S. W. 548.

31 A. L. R. 1479.

State v. Chance, 29 N. M. 34, 221 Pac. 183, 31 A. L. R. 1466.

Minn. Stat. 1941, § 630.18.

Mason's Stat. 1927, § 10685.

State v. Ruther, 141 Minn. 488, 168 N. W. 587.

State v. Ernster, 147 Minn. 81, 179 N. W. 640.

ARGUMENT.

I.

The petitioner is not entitled to invoke the Fifth Amendment.

His claim is that under the Fifth Amendment he was entitled to be tried under an indictment. But, "the First Eight Amendments, forbid the abridgement only by acts of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to the acts of the states".

11 Am. Jur. Title: Constitutional Law, 1096.

This petitioner could have been legally brought to trial without even first presenting the case to the grand jury. He could have been tried upon an information filed by the county attorney. Minn. Stat. 1941, Sec. 628.29; Mason's Stat. 1927, Sec. 10664. By such a course his constitutional rights would not be violated because the Fifth Amendment is inapplicable.

There remains only the question whether there has been any violation of the Fourteenth Amendment.

II.

The petitioner's rights under the Fourteenth Amendment have not been violated.

While the petitioner was entitled to a hearing under the due process clause, he was not entitled to any particular procedure or to trial on indictment or to a trial by jury.

Frank v. Mangum, 237 U. S. 309, 340; 59 L. ed. 969.

Quoting therefrom:

> "* * * the due process clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. *Indictment by grand jury is not essential to due process* (Hurtado v. California, 110 U. S. 516, 532, 538; Lem Woon v. Oregon, 229 U. S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (Walker v. Sauvinet, 92 U. S. 90) or in criminal (Hallinger v. Davis, 146 U. S. 314, 324; Maxwell v. Dow, 176 U. S. 581, 594, 602, 604)."

See Simon v. Craft, 182 U. S. 427, 437, 45 L. ed. 1165, where Mr. Justice White said:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it * * *. If the essential requisites of full notice and an opportunity to defend were present, *this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case.*"

III.

The petitioner does not make it appear as a matter of law that incompetent evidence was received before the grand jury.

To sustain this point, a quotation is taken from the decision below.

State v. Kahner, ... Minn. ..., 15 N. W. 2d, 105.

> "A motion to quash the indictment upon the ground that the only evidence received by the grand jury concerning the facts constituting the offense was incompetent, in that it consisted of the testimony of Goulet, who prior to his appearance as a witness before that body had been adjudged insane and had not been restored to capacity. The court denied the motion. * * *
>
> "At the beginning of Goulet's examination as a witness at the trial, defendant objected to his competency upon the grounds that he had been adjudged insane and had not been restored to capacity. The court examined him at length to determine his competency as a matter of fact. It had before it the adjudication of

the probate court of Goodhue county that he was insane, the commitment under which he was taken to an institution for treatment, and the order releasing him from the institution. There was no evidence that Goulet had ever been restored to capacity. The court found, as a fact, that he was competent and permitted him to testify. After the Court determined that he was competent, but before he testified, defendant offered to show further in support of the claim of Goulet's incompetency to be a witness that Goulet had had several positions since his discharge from the institution; that he had misstated his age to obtain one of those positions; and that he had lied on some other occasions. The court held that these offers went not to his competency but to his credibility, and permitted defendant to show those facts upon Goulet's cross-examination. * * *

"We shall assume, without so deciding, that the motion to quash the indictment properly raises the question that it was based upon the claimed to be incompetent evidence of Goulet. The question of his competency was properly raised at the trial. Under Minn. St. 1941, § 595.02(6), (Mason St. 1927, § 9814(6)), 'persons of unsound mind' are incompetent as witnesses. In order to constitute grounds for excluding the witness's testimony, the mental incompetency must exist at the time he is offered as a witness. The determination of the competency of a witness is for the trial court. Where the competency of a witness is challenged upon the ground of unsoundness of mind, the trial court should, as it did here, conduct a preliminary inquiry to enable it to determine the fact of the witness's competency.

"If it appears from the inquiry that the witness understands the obligation of an oath and is capable of correctly stating the facts to which his testimony relates, he is competent in fact and should be permitted to testify. State v. Prokosch, 152 Minn. 86, 187 N. W. 971.

> The competency of a witness depends upon his mental condition when he is offered as a witness and should be determined as of that time. *The fact that the witness has been adjudged to be insane and committed to an insane asylum from which he had been subsequently discharged does not establish as a matter of law his incompetency at the time he is offered as a witness, and, if he is in fact competent at that time, is no ground for excluding his testimony.* Ross v. D. M. & I. R. Ry. Co., 203 Minn. 312, 281 N. W. 76, 271; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164. See State v. Hayward, 62 Minn. 474, 65 N. W. 63. The fact that the witness had not been restored to capacity (an insane person may be restored to capacity in proceedings under Minn. St. 1941, § 525.61 (Mason St. 1940 Supp. § 8992-143)), is of no importance in this connection. His competency as a witness depended upon his mental capacity at the time he was offered as such. There was no other showing as to Goulet's alleged incompetency when he was a witness before the grand jury. *Hence there was no showing requiring a finding that he was incompetent at that time.*"

It is of course true that a person, who has been committed to an insane asylum and has been released therefrom, may make a valid contract (Knox v. Haug, 48 Minn. 58, 61), or a valid will (McAllister v. Rowland, 124 Minn. 27), if he is sane at the time—so also he may testify as a witness (Cannady v. Lynch, 27 Minn. 435). It was for the grand jury and the court to determine his competency at the time he appeared as a witness. This court is in no position to override their determination of the fact. The trial court made an extended examination as to the competency of the witness on the trial on February 3, 1943, and found him then a com-

petent witness. (See last quotation supra.) It is at least as reasonable to infer that he was competent when he testified before the grand jury on October 20, 1942, as it is to infer that he was then incompetent, especially in view of the fact that the witness was sent home from the asylum on September 12, 1942.

The fundamental misconception of the law under which petitioner is laboring is this:

He asserts that the commitment of a person to the asylum is conclusive evidence of insanity after the patient has been discharged from the hospital.

It is merely evidence to be considered in arriving at a determination whether the patient was insane at a later date. It may be considered. *It is not conclusive.*

Schultz v. Oldenburg, 202 Minn. 237, 243, 277 N. W. 918.
Champ v. Brown, 197 Minn. 49, 266 N. W. 94.

IV.

Even if the testimony of an incompetent witness was received by the grand jury, an indictment based partly on competent and partly on incompetent testimony will be sustained.

State v. Marshall, 140 Minn. 363, 168 N. W. 174.
Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207, annotation at 1209 and 1210.

The mere fact that some incompetent evidence is received by the grand jury is no ground for quashing the indictment. It is not for this court nor for the trial court to inquire into the sufficiency of the evidence (either that of Eugene or of

the other witnesses) to support the indictment. The presumption is that the evidence was sufficient.

Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021.
U. S. v. Perlman, 247 Fed. 158, 162.

In the case of State v. Grady, 12 Mo. App. 361 (cited by appellant) no evidence whatever and no witness was presented before the grand jury; in the later case of State v. Shreve, 137 Mo. 1, 38 S. W. 548, it was held that the reception of incompetent evidence before the grand jury did not invalidate the indictment if, in fact, *one competent witness testified.* Petitioner does not attempt to say what the witness Joseph Goulet testified to before the grand jury.

Attention is directed to this fact: The Minnesota Supreme Court noted that petitioner's co-conspirator talked with both Eugene Goulet and with Joseph Goulet (father of Eugene, whom petitioner forgot to mention as being a witness called before the grand jury), also the testimony of Comstock (15 N. W. 2d, 105, 107),—another grand jury witness. Whether the testimony of these witnesses would justify the indictment is not a question into which the court will inquire—particularly in view of the decision of the lower court in the case. The conclusive presumption is that the evidence was sufficient.

The question of the power of the courts to pass upon the competency, legality or sufficiency of evidence on which an indictment is based is annotated in 31 A. L. R. p. 1479. The annotation is appended to the report of the case of State v. Chance, 29 N. M. 34, 221 Pac. 183, 31 A. L. R. 1466, in which case the court held:

"District Courts are without power to review the evidence submitted to a grand jury upon which an indict-

ment was returned, to determine its sufficiency or insufficiency, existence or nonexistence, legality or illegality, as the finding of such grand jury with regard to such questions is conclusive."

And the author of the annotation cited says:

"In the majority of jurisdictions the rule obtains that the court will not inquire into the legality or sufficiency of the evidence on which an indictment is based, even if it is averred that the indictment was found without any legal evidence being produced before the grand jury. This view is based, by the courts maintaining it, on one or more of the following reasons: That the grand jury is a judicial body whose finding is conclusive as against a motion to quash; that the secrecy of grand jury proceedings will not be invaded; and that a statute prescribing grounds for the quashal of indictments, and not mentioning insufficiency of the evidence, is conclusive."

The author cites the federal courts as adhering to this rule together with a large majority of the state courts.

The Minnesota statute prescribes the grounds upon which indictments may be set aside (Minn. Stat. 1941, § 630.18; Mason's Stat. 1927, § 10685).

Insufficiency or incompetency of the evidence is not one of the grounds specified.

See:

State v. Ruther, 141 Minn. 488, 168 N. W. 587;

State v. Ernster, 147 Minn. 81, 179 N. W. 640.

There is no showing that the petitioner attempted to invoke any provision of the federal constitution in the lower state court.

CONCLUSION.

The petition does not present any federal constitutional question; nor does it show any violation of any federal constitutional right. Proof that a witness was at one time adjudged insane does not as a matter of law establish the incompetency of his testimony at a later time after he has been released from the asylum. Courts will not inquire into the competency or sufficiency of the evidence on which an indictment is based.

The application for a writ of certiorari should be denied.

Respectfully submitted,

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